

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the	)	WC Docket No. 02-112
BOC Separate Affiliate and Related Requirements	)	
	)	
2000 Biennial Regulatory Review	)	CC Docket No. 00-175
Separate Affiliate Requirements of	)	
64.1903 of the Commission's Rules	)	

**COMMENTS OF WORKING ASSETS LONG DISTANCE ON THE  
FURTHER NOTICE OF PROPOSED RULEMAKING**

In accordance with the Further Notice of Proposed Rulemaking (the "FNPRM") in the above referenced proceedings released on May 19, 2003, Working Assets Funding Service, Inc. dba Working Assets Long Distance ("Working Assets"), hereby submits its comments ("Comments") on certain issues raised by the FNPRM.

**I. INTRODUCTION AND SUMMARY**

In its FNPRM, the Commission requested comments on a number of issues related to modifications to its regulations relating to Section 272 of the Telecommunications Act,<sup>1</sup> in particular whether changes in the competitive landscape since Section 272 was enacted warrant modifications of the Commission's regulatory oversight of the Regional Bell Operating Companies ("RBOCs") and other incumbent local exchange carriers ("ILECs"). Working Assets submits these limited Comments to provide the Commission with the perspective of a relatively small competitor in the residential long distance telecommunications market. In general, these Comments identify the detrimental affect that relaxation of the Section 272 safeguards will have on competition for interexchange services if that occurs before certain structural changes to the telecommunications industry are in place. These consequences will flow from the fact that RBOCs have, and will continue to have in the absence of the structural changes, the ability and incentive to unreasonably discriminate against their long distance and

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<sup>1</sup>See 47 U.S.C. §§272 (a)-(h)(1996).

competitive local exchange carrier (“CLEC”) competitors, which in many cases are also their customers. At present, the Section 272 requirements provide the Commission with an important tool for discovering and investigating monopoly abuse. In the absence of these rules, other preventative measures are required.

Before the Section 272 requirements can be relaxed, without impairing the Commission’s ability to monitor possible RBOC abuses of their monopoly power and the commensurate damage to interexchange competition, the Commission should impose two conditions. First, the Commission should require that an independent third party preferred interexchange carrier administrator (“PIC Administrator”) be established and operational prior to the removal of any Section 272 requirements. This would materially reduce the substantial risk that an RBOC could abuse its current control over the PIC change process in favor of its own long distance service. Second, the Commission should retain the separate affiliate requirement for those services that the RBOC provides, both to its long distance affiliate and to other interexchange carriers, such as switched and special access and unbundled network elements. Without the separate affiliate requirement, the RBOCs can discriminate in favor of their own affiliate and the Commission will have little or no ability to monitor this behavior.

## **II. MARKET POSITION OF WORKING ASSETS LONG DISTANCE**

Working Assets resells long distance services to residential and small business customers. It does not own any interexchange facilities nor does it offer any local exchange services. Instead, Working Assets purchases interexchange telecommunications services from other certificated interexchange carriers on a wholesale basis and resells these services to its retail customers. As of May 2003, Working Assets had approximately 380,000 residential end-user customers. Because Working Assets depends on facilities-based carriers for the services that it resells it has a strong interest in seeing that the interexchange market in general is sustainably competitive. In addition, because Working Assets must compete against both the RBOC affiliated long distance carriers as well as other interexchange carriers, it has a strong

interest in seeing that no competitor has the ability to exploit its market power to the disadvantage of its competitors and competition in general.

Working Assets has provided long distance services in California and New York since 1991 and in Texas since 1992. Therefore, Working Assets has experienced first hand the entry into these long distance markets by Verizon in New York, Southwestern Bell Telephone Company in Texas, and SBC Communications in California. All of these RBOCs are ILECs with near-monopoly market shares in their local service territories. Working Assets' experience in these states forms the basis for the concerns expressed herein and can inform the Commission's decision regarding the value and need to continue imposing the Section 272 requirements on the RBOCs in the absence of the structural remedies Working Assets proposes.

Working Assets primarily generates new customers through direct mail. Most enrollments occur by customers sending in a letter of agency that they have received in the mail or from a friend. However, a significant number of new customers subscribe to Working Assets by calling their local telephone company and requesting that Working Assets be assigned as their PIC. In most instances the customers who contact their local telephone company have received the direct mailing or seen a Working Assets advertisement, but no longer have the coupon or the Working Assets toll free telephone number for ordering service.

### **III. THE RBOC'S ABILITY TO JOINT MARKET LOCAL AND LONG DISTANCE SERVICES CREATES INCENTIVES FOR ANTI-COMPETITIVE ACTIONS THAT MANDATE RETENTION OF THE SECTION 272 REQUIREMENTS**

The Commission permits the RBOCs to "joint market" their local and affiliate companies' long distance services.<sup>2</sup> Joint marketing encompasses the provision of facilities, services, people, and other resources by the RBOCs' local service operations to their long distance affiliates as well as allowing the RBOC local entity to market both its local services and its affiliate's long distance services at the same time.

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<sup>2</sup> See, e.g., *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket 99-295, *Memorandum Opinion and Order*, FCC 99-404, 15 FCC Rcd 3953 (1999) at para. 419-421.

A clear example of RBOC joint marketing local and long distance services occurs when an end user contacts the RBOC to obtain local telephone service and the RBOC customer service employee engages in a “sales pitch” with that end-user, urging the end-user to also acquire the affiliate’s long distance services. The RBOCs receive many thousands of calls per day from their customers to their customer service representatives. These customers call to obtain new local service, request additional local lines, moves, rearrangements, repairs, and other assistance. Even without constant and pervasive advertising, by being purely passive and simply receiving calls from their monopoly local service subscribers, the RBOCs are provided with a virtually cost-free opportunity to actively market their affiliates’ long distance services to hundreds of thousands of subscribers per month.

Moreover, due to the constant stream of incoming local exchange service related calls from their monopoly base of customers, the RBOC is not burdened with having to make “cold call” outgoing calls to parties who may have absolutely no interest in purchasing long distance services. Rather, they benefit immensely from calls initiated by their customers who want the RBOC to accommodate requests for local service in a timely, accurate, and informed manner. The end-user customer is therefore particularly receptive to RBOC suggestions for other service options, options that the RBOC can tailor to the customer’s needs because of its access to specific and detailed information about the customer’s calling patterns, services, and other private information (generally referred to as “Customer Proprietary Network Information” or “CPNI”).

The RBOCs overwhelming dominance of the local exchange market in the service areas where it is the incumbent LEC and its access to CPNI provides them with a unique and powerful opportunity to also dominate the interexchange market, absent retention of the Section 272 requirements. No other telecommunications provider, be it a competitive local exchange company, an interexchange company, or an independent incumbent local exchange carrier, has access to residential customers comparable to that available to the RBOC in its capacity as the dominant local exchange carrier. This unfettered access to residential customers and their

service information provides an RBOC with the opportunity to engage in subtle marketing tactics designed to steer customers away from competitors and towards the affiliated company's long distance service.

In New York, for example, it has been Working Assets experience that Verizon local exchange service representatives have claimed no knowledge of Working Assets and refused to presubscribe customers to Working Assets Long Distance. In addition, when some customers have switched to Verizon local service from a competing local carrier and want to continue with Working Assets as their presubscribed long distance carrier, their long distance service has not been activated at the same time as the local service, leaving them without presubscribed long distance service for as long as two days. Such tactics are further encouraged, even if in violation of the local exchange carrier's written policies, if the customer service representatives are compensated or receive bonuses based on the amount of the long distance affiliate's services that he or she sells.

Such exclusive joint marketing activities obviously present an RBOC and its long distance subsidiary with a significant and determinative market advantage in its service territory. Coupled with its role as the PIC Administrator, as further described below, RBOCs have the incentive and opportunity to engage in anticompetitive behavior. Therefore, as long as the RBOCs are permitted to joint market their monopoly local and long distance services, the competitive protections provided by Section 272 must be retained.

#### **IV. THE SECTION 272 REQUIREMENTS SHOULD NOT BE RELAXED UNTIL A THIRD PARTY PIC ADMINISTRATOR PROCESSES ALL ORDERS FOR INTEREXCHANGE SERVICES**

Once an RBOC receives an order for intraLATA and interLATA interexchange services from a local service customer, that customer's local exchange carrier must program the carrier choice into the customer's serving end-office switch. At present, given the limited amount of competition for local exchange services, the RBOCs almost exclusively perform this PIC Administrator function. This means that the RBOC has control over the actual implementation of most customers' choice of long distance carriers. Thus, for the overwhelming majority of end

users, it the RBOC must initiate the network-related activities required to route the end user's long distance traffic to that end-user's chosen long distance company, be it the RBOC affiliate or a competitor. Together with the right to joint market the RBOC's affiliated long distance service, this role as the PIC Administrator provides the RBOC with additional opportunities to unfairly favor its affiliated company over other long distance competitors.

Because the RBOCs continue to be the dominant local carrier for residential customers in their service areas, and will likely continue in this capacity for some time to come, the RBOC local service representatives speak with many end users. As the PIC Administrator for these customers, the RBOCs "administer" and market long distance services at the same time. This dual role provides the RBOCs with an incentive to use the PIC Administrator position in a competitively unfair manner. Without the separate affiliate requirement, the incentive for competitively unfair behavior will increase because there will be less chance of the behavior being discovered.

The RBOCs can benefit competitively from this dual role in a number of ways. For example, if an RBOC local exchange customer wanted to change his or her long distance carrier from the RBOC affiliate to Working Assets, any delay implementing this PIC change would result in higher revenues to the affiliate, and therefore the RBOC family. Absent regulatory oversight, the RBOC's role as the *de facto* PIC Administrator results in substantial harm to the competitive process because of the clear and powerful economic incentive for the RBOC to unfairly leverage its powers as the PIC Administrator to the competitive benefit of its affiliate.

The PIC Administrator role extends beyond simply programming the customer's requested interLATA or intraLATA toll service provider change(s). In order to provide their services, interexchange carriers must have certain basic information about their customers, such as name and billing address. Interexchange carriers do not necessarily receive this information when a customer requests their services, since the customer often makes that request to the local exchange carrier. In those instances, the interexchange carrier must rely on the PIC Administrator to provide the information, which in most cases is the RBOC. This information is

essential for interexchange carriers to provide service to their customers and avoid accusations of slamming,<sup>3</sup> providing the RBOC with yet another incentive to delay providing it, or not providing it all.

Effective Commission oversight requires that the Section 272 requirements remain in place. The key requirement is that of providing long distance through a separate affiliate, until an independent third party PIC Administrator can be established in the states, or regions where the RBOC has obtained interLATA service carrier authorization.

California and New York [I will research others] have recognized the importance of the PIC Administrator role and are in the process of investigating the feasibility and costs associated with establishing a neutral third party PIC Administrator in those states. The California Public Utilities Commission found that “[a]bsent competitively neutral and nondiscriminatory intraLATA LPIC administration, there is a substantial possibility that the intrastate interexchange telecommunications market will be harmed through increasing customer dissatisfaction and carrier conflicts”<sup>4</sup> and has ordered that

The Telecommunications Division staff [of the California Public Utilities Commission] under the supervision of its Director shall prepare for consideration on the Commission’s meeting agenda, an Order Instituting Investigation to examine the efficacy, feasibility, structural implementation, and selection criteria for selecting a competitively neutral third party Preferred Interexchange Carrier administrator for California, and the desirability of continuing PIC and LPIC distinctions, no later than five months from the effective date of this order.<sup>5</sup>

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<sup>3</sup> For example, when an end user contacts the ILEC to change its PIC but does not also contact the existing interexchange carrier, the only way the existing interexchange carrier would know to stop billing the customer is the CARE message from the ILEC documenting the change. For reseller interexchange carriers such as Working Assets, if the new PIC is the underlying carrier (or another reseller of the underlying carrier), there is the possibility that the traffic could be sent to the old PIC by the underlying carrier, rather than the new one, especially if there was any lack of or mistaken communication between the reseller(s) and the underlying carrier. This could occur because when switchless reseller’s are involved the ILEC sends reseller traffic to the underlying carrier where it is then supposed to be directed to the proper reseller based upon the underlying carrier’s own records, which rely on receiving accurate CARE information from the ILEC.

<sup>4</sup> *Rulemaking on the Commission’s Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*; D. 02-09-050, 2002 Cal. PUC LEXIS 619, at \*152 (2002), Conclusion of Law 112.

<sup>5</sup> *Id.*, at \* 153, Ordering Paragraph 16.

The California Commission has yet to begin its investigation. However, the staff has noted that it intends to issue the investigation document shortly. The California Commission should soon begin its investigation and Working Assets will work closely with that investigation. However, it is essential that the Federal Communications Commission maintain the Section 272 protections until it is complete.

**V. THE SECTION 272 REQUIREMENTS MUST BE RETAINED IN ORDER TO MONITOR AND PREVENT OTHER POTENTIAL ANTICOMPETITIVE BEHAVIOR BY RBOCs**

Any RBOC that has been granted Section 271 authority to provide in-region interexchange service<sup>6</sup> has an incentive to discriminate against the interexchange carrier access customers that compete with its long distance affiliate. In the absence of a separate affiliate requirement the Commission will not be able to easily discern whether the RBOC is providing switched and special access to all interexchange carriers in a non-discriminatory manner. The RBOC has an inherent economic incentive to favor its own affiliate with respect to the quality of services provided, their reliability, the timeliness and accuracy of their installation or disconnection or rearrangement, the accuracy of billing and other information, and almost every other aspect of these services. Through this power the RBOC can impact the marketability of the retail services its competitors provide through using these access services.

Without the separate affiliate requirement, the Commission's ability to police and monitor potential discriminatory behavior is insufficient. These types of problems demonstrate what can be expected to occur in the interexchange market if the Commission removes the Section 272 restrictions prematurely because of an arbitrary time period rather than actual market conditions, such as the availability of cost-effective alternative providers for these services. If the RBOC joins with its affiliate to become the competitor of its interexchange carrier customers, the Commission will have little or no insight into when discriminatory behavior is occurring.

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<sup>6</sup> 47 U.S.C. § 271.



## CONCLUSION

The Commission's paramount goal, if and when it modifies the Section 272 requirements, should be to ensure that it does not threaten the current competitive status of the long distance telecommunications service markets merely to allow the RBOCs to escape the burdens of Section 272 compliance. Based on lack of competition in the residential local telecommunications markets, as evidenced by Working Assets' experience, it is critically important that the Commission take all steps possible to promote and maintain conditions under which effective local competition can take hold before it relaxes the regulatory requirements it now imposes on the RBOCs long distance affiliates.

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Respectfully submitted,

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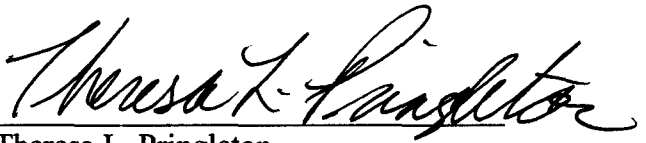
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**CERTIFICATE OF SERVICE**

I, Theresa L. Pringleton, do hereby certify that I have on this 30th day of June, 2003, had copies of the foregoing **COMMENTS** delivered to the following via electronic mail:

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